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Office of Administrative Law Judges
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Issue Date: 21 January 2004

Case No.: 2002-DCW-5
OWCP No.: 40-102993
In the Matter of:

GEANETTE A. TYLER,
Claimant

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY,
Employer-Self-Insured

DECISION AND ORDER
DENYING REQUEST FOR MODIFICATION AND
DISMISSING COMPLAINT

On December 5, 2003, I issued a Status Order and Order to Show Cause, directing the Employer to advise the Court as to whether the Claimant had responded to the Employer's discovery requests; and if the Claimant had not responded, directing the Claimant to show cause as to why her claim should not be denied pursuant to 29 C.F.R. Section 18.6(d)(2)(v).

On December 11, 2003, counsel for the Employer filed a response, stating that it had not received a response to its interrogatories or requests for production, nor had it received communication from the Claimant's attorney regarding its discovery requests. On December 13, 2003, the Claimant filed a handwritten pleading that is difficult to comprehend, but appears to take issue with previous decisions in the Claimant's claim. It does not address the Claimant's lack of response to Employer's discovery requests.

On December 15, 2003, counsel for the Claimant submitted a response, agreeing that the Claimant had not responded to discovery, but stating that this failure was not the result of the Claimant's recalcitrance, but was due to counsel's misunderstanding of the process. Counsel attached the Claimant's response to the discovery requests.

In the answers to interrogatories, which were not signed or attested to by the Claimant, but were signed by her counsel, the Claimant indicated that she was seeking 100% total permanent disability. In response to a question asking her to identify each physical and health provider or facility from whom she had received treatment for the injury to her spine, the Claimant identified Dr. Rida Azar. However, in response to the next question, which requested that she identify the period of time when treatment was rendered, she answered "None."

In response to a question asking her to identify health care reports or records on which she would rely to support her claim, the Claimant responded "Records being assembled from health provider. Dr. John Pan, Group Health Association, Inc., 2121 Pennsylvania Ave. N.W. Washington, D.C. 20037 dated 5-19-76." She also indicated that she did not intend to seek additional reports, nor did she intend to call any experts at the hearing. As the evidence she intended to introduce at the hearing, the Claimant identified "Transcripts from all prior proceedings."

Finally, the Claimant, in response to a question asking her to identify her witnesses and provide a detailed summary of their testimony, identified herself and Dr. Rida Azar.

DISCUSSION

As noted by the Board in its April 29, 2003 Order, this case has a protracted history. I incorporate by reference this history, as accurately set out by the Board. In her Decision and Order issued on August 2, 2000, Administrative Law Judge Pamela L. Wood granted the Employer's motion for modification of a previous award of permanent total disability benefits, to one of permanent partial disability, effective May 19, 1994. The Benefits Review Board (Board) affirmed Judge Wood's finding that the Employer established the availability of suitable alternate employment, and that the Claimant did not diligently seek alternate work. The Board denied the Claimant's motion for reconsideration, and the U.S. District Court for the District of Columbia dismissed her appeal for lack of jurisdiction.

While the Claimant's appeals of Judge Wood's decision were pending, the Claimant filed various pleadings with the Office of Workers' Compensation Programs and the Office of Administrative Law Judges regarding the issue of the credit that was due as a result of the Employer's overpayment of compensation. A hearing was held by Administrative Law Judge Daniel Solomon on April 26, 2001; Judge Solomon remanded the claim to the District Director on May 30, 2001.

Thereafter, an informal conference was scheduled for consideration of the Claimant's allegation of a change in condition, and the causal relationship of these complaints to her underlying work injury. After a recommendation was issued on January 7, 2002, the Claimant requested that her claim be referred to the Office of Administrative Law Judges, and a hearing was scheduled for June 11, 2002. Pursuant to the prehearing Order, the Employer attempted to serve on the Claimant, by certified mail, interrogatories and requests for production of documents concerning the Claimant's financial and health status. These documents were returned to the Employer, stamped "Refused by Addressee."

The Employer filed a motion to compel the Claimant to respond to the discovery requests. I conducted a conference call, as reflected in my May 28, 2002 Order Regarding Discovery. During this conference, I advised the Claimant that I would forward to her the Employer's discovery requests, by certified mail. The Claimant was specifically advised that she

should respond to the requests, and that her refusal to cooperate could lead to the dismissal of her claim.

The Claimant signed for receipt of the documents on June 12, 2002. In December 2002, the Employer advised that it had not received any response to these discovery requests. On December 18, 2002, I issued an Order to Show Cause, requiring the Claimant to show why her claim should not be dismissed for her failure to cooperate in the discovery process. The Claimant did not respond, and on January 10, 2003, I issued an Order dismissing her claim.

The Claimant appealed pro se. The Director argued that my dismissal was improper, in that the only sanction for refusal to cooperate with discovery is for the administrative law judge to certify to the District Court the facts surrounding the Claimant's failure to obey a lawful order, pursuant to Section 27(b), 33 U.S.C. Section 927(b). The Director asked that the Board vacate the dismissal, and remand for me to enter findings of fact for certification to the District Court, pursuant to the Board's decision in *Goicochea*. The Employer asked that my decision of dismissal be affirmed, but on receipt of the Director's brief, concurred in the motion to remand.

The Board noted that I did not specifically state by what authority I was dismissing the claim, although I cited to *Societe Internationale Pour Participations Industrielles Et Commercials v. Rogers,* 357 U.S. 197 (1958), which discusses the dismissal of a complaint for noncompliance with a production order pursuant to Federal Rule of Civil Procedure 37(b). The Board found that, as Section 27(b) of the Act provides the exclusive remedy for a claimant's noncompliance with an Administrative Law Judge's discovery orders, the dismissal could not stand.

Title 29 C.F.R. Section 18.6(d)(2) provides:

If a party or an officer or agent of a party fails to comply with a subpoena or with an order, including, but not limited to, an order for the taking of a deposition, the production of documents, or the answering of interrogatories, or requests for admissions, or any other order of the administrative law judge, the administrative law judge, for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following:

. . . .

(v) Rule that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the non-complying party, or both.

Here, the Complainant was specifically directed, during a telephone conference and in my Order of May 28, 2002, that she was required to respond to the Employer's discovery requests. She received these requests, as evidenced by her signature on a delivery of receipt. The Claimant still did not answer the discovery requests, nor did she respond to my Order to Show Cause issued on December 18, 2002.

In this case, it is the Claimant who has asked for modification of Judge Wood's decision, which has result in the reduction of her benefits. Yet she has refused to participate in any way in the adjudication process, either at the Director's level or before the Office of Administrative Law Judges. As I explained to the Claimant, the Employer is entitled to know the nature and particulars of her claim, so that it may prepare a defense.

Mr. Norman Robinson, who has entered an appearance as the Claimant's attorney, agreed that the Claimant did not comply with "some" of the orders I issued. He argues that her failure to comply was not as a result of "complete recalcitrance" with respect to the discovery process and my orders, but was the result of a misunderstanding of the process, confusion about dates to appear, and inability to comply with the discovery request without counsel.

Mr. Robinson also stated that the Claimant has had trouble seeing for some time and therefore is unable to read and respond to much of her correspondence without assistance. I note that this problem has not prevented the Claimant from filing numerous pleadings in this office and before the Board.

Claimant's counsel argues that the Claimant has had some confusion about dates, specifically referring to the fact that the Claimant showed up on June 11, 2003 for her hearing, when it had been cancelled. I note that during the telephone conference on May 28, 2002, I advised both parties that the hearing scheduled for June 11, 2002 would be cancelled until the discovery issues could be resolved. My Order Regarding Discovery, which was sent to the Claimant by certified mail, also stated that the hearing was cancelled. Yet on the morning of June 11, 2002, the Claimant appeared at the building housing the Office of Administrative Law Judges, insisting that the hearing was scheduled for that date. She denied that any telephone conference had taken place, or that she had been informed that the hearing had been cancelled.

In short, the Claimant has neither complied with nor responded to any of the orders I have issued in this case. I note that when my former law clerk, Mr. Cokley, contacted the Claimant regarding the telephone conference, she told him that she would not participate. Although she did in fact later participate in the conference, she hung up before it was completed. I find that the Claimant's actions do demonstrate complete recalcitrance with respect to the discovery process and my orders, continuing to the present date.

As noted above, this matter is before me on the Claimant's allegation of a change in condition. As the moving party, the Claimant bears the burden of establishing that her condition has changed, such that she is now permanently and totally disabled.

I find that the responses to the Employer's interrogatories and document requests are deficient, in that they are not signed or attested to by the Claimant. But even if they were, on their face, they establish that there are no grounds to support the Claimant's request for modification. In response to the interrogatories, the Claimant has not provided any information to suggest that her previous condition, which involved injuries to her abdomen and coccyx, has changed, or that she has developed additional conditions that are causally related to her original injuries. She specifically states that no treatment has been rendered by Dr. Azar, and the only report she identified was from Dr. John Pan, dated May 19, 1976. As the written or documentary

evidence on which she intends to rely at the hearing, she identifies the transcripts from prior proceedings.

In short, the Claimant has identified no new facts or documents that would support a finding that she has experienced a change in condition, whatever that change in condition might be. Indeed, it appears that the Claimant views these proceedings as another avenue for appeal of Judge Wood's determination, rather than as a new and separate proceeding. That this is so is supported by the Claimant's handwritten response to my Order to Show Cause which, incoherent as it is, strongly reflects the Claimant's dissatisfaction with Judge Wood's decision.

Thus, I find that the Claimant has not responded to the Employer's discovery requests, in that she has not identified any fact, condition, or medical report that supports her claim of a change in condition. Thus, pursuant to 29 C.F.R. Section 18.6(d)(2)(v), I am denying her request for modification.

I also note that Fed.R.Civ.P. 12(b)(6), applicable to this Court pursuant to 29 C.F.R. Section 18.1(a), provides for entry of a judgment on the pleadings for failure to state a claim upon which relief can be granted. The Claimant has never articulated the factual basis for her allegation of a change in condition, either to this Court or in discovery. I find that she has not stated a claim upon which relief can be granted under the Act, and therefore this matter will be dismissed.

Accordingly, for the reasons stated above, IT IS HEREBY ORDERED that the Claimant's request for modification of the August 2, 2000 decision and order of Judge Wood is DENIED, and the Claimant's claim is DISMISSED.

SO ORDERED.

A

LINDA S. CHAPMAN
Administrative Law Judge